FILE COPY

SUPREME COURT, U.S.
FILED
OCT 23 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 379

EMILY BAUM, ADMINISTRATRIX OF THE ESTATE OF FLOYD BROWN, DECEASED,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

JUSTIN WAITKUS,
ANTHONY J. CEFALL,
Attorneys for Petitioner.

SACKETT, PYATT & WAITKUS,
569 Broadway,
Gary, Indiana,
Of Counsel.

THE LAWYERS PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 379.

EMILY BAUM, ADMINISTRATRIX OF THE ESTATE OF FLOYD BROWN, DECEASED,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

Respondents in their brief state that Petitioner's statement of the case is in many respects inaccurate but nowhere does Respondent point out any instance of any inaccuracy.

Respondents in their statement of the case attempt to rearrange the evidence to suit their own purposes by misstating certain facts, omitting other pertinent facts and by drawing conclusions favorable only to Respondents.

The Respondents on page 2 of their brief would like to confuse the issues in this case by saying the mutilated body of Floyd Brown was discovered by the engineer of the 11:42 A. M. eastbound train.

Respondents would infer and would like this Court to

believe that Floyd Brown was already dead and his body mutilated *prior* to the arrival of the 11:42 A. M. eastbound train.

Let us look at the evidence of the 11:42 A. M. engineer, Marr, who is the only employee reporting having seen Floyd Brown on the track. The engineer, Marr, said, "I saw for the first time *an undiscernible object* that looked something like a collection of *newspapers bundled up* * * *." From these words it is apparent that the engineer was describing what he saw as a singular, compact unit or object. Any newsboy knows that a bundle of newspapers is a solid, tightly bound entity. This evidence obviously does not refer to mutilation or "his mutilated body."

Engineer Marr further said, "I could not tell what *it* was." There is no plurality in this statement.

Marr further stated, "*It* also looked like rags or sacks and *this unknown object* was about 200 feet ahead when I first saw *it*." This statement is clearly referring to a single object which is seen in point of space at a definite and particular point ahead.

Engineer Marr also said, "About the time the front of the engine reached *this object* * * *" Again the reference is to a singular object. He went on and said, "I did not have any idea what *this object* was until our train was right *on it*." (App. 24.)

From the above, it is apparent that there were nine separate words of identification used, all referring to an object in the singular, Floyd Brown. It is clear that these words do not refer to a mutilated body discovered *prior* to being run over by the 11:42 A. M. eastbound train.

From the above evidence, Respondents would have this Court believe that the employee was already dead and his body mutilated and scattered up and down the track *prior* to the arrival of the 11:42 A. M. train.

Does it not appear reasonable that, if Marr had seen a mutilated body scattered up and down the tracks for some distance, he could have easily said so in the statement that he made to his employer three days afterward when he referred to the accident to Floyd Brown? (App. 24.)

Petitioner certainly feels that the jury has the right to draw its conclusions and inferences from this evidence as to what Marr saw or did not see.

We have here a situation of an unwitnessed death. The evidence shows that at 4:30 A. M. that morning Floyd Brown was alive, sober, normal and in good health and was last seen walking towards the tracks. As we stated in our petition, there is a presumption that life continues until shown otherwise and also the presumption that a person looks out for his own safety. There is no evidence in the record to show that Floyd Brown met his death *prior* to the arrival of the 11:42 A. M. eastbound train. The Respondents admitted and stipulated at the trial that, if Floyd Brown were alive at the time the train struck him, that would be the cause of his death.

It is obvious that the place of death was on the eastbound mainline track.

Respondents admit on page 3 of their brief that the eastbound trains *prior* to the 11:42 A. M. train had not been involved in any accident. The evidence shows that the engineers of these *prior* trains said they kept a look-out ahead as they passed the camp area and did not see any object or body on the tracks and that, if there had been any object or body on the tracks, they would have seen it. (App. 23.)

By these admissions in the evidence, it is apparent that Floyd Brown was still alive and had not yet arrived at the death scene. *Ergo, he was still alive.* The next reference to Floyd Brown is made by the next eastbound engineer,

Marr, passing at 11:42 A. M., who saw an object ahead of him, which object he referred to nine times as being in the singular.

Obviously, at this time Floyd Brown was still a whole human being.

After the 11:42 A. M. train ran over Floyd Brown and *before* the arrival of the Coroner, several other eastbound trains passed over the death scene.

It is significant to note that only *after* the passing of the 11:42 A. M. train was the body characterized as mutilated, dismembered and scattered up and down the eastbound mainline track by the testimony of the Coroner and the section foreman, Litchfield. (App. 9, 20, 21.)

If, as Respondents admit, neither of the eastbound trains *prior* to the 11:42 A. M. train were involved in any accident, the inescapable conclusion then is that Floyd Brown, presumed to be alive until proven otherwise, was alive when the 11:42 A. M. train saw him, ran over him and kept on going.

Taking the above evidence with the evidence of a defective roadbed (burned out ties), a shoe caught under a tie plate and the failure of operating personnel to give warning, together with all the facts, circumstances and inferences surrounding the death of Floyd Brown, this certainly becomes a question of fact for the jury.

Respondents try to minimize Petitioner's evidence by calling such evidence theories and suggestions. They conveniently ignore answering the questions presented by the Petitioner in support of the writ of certiorari.

In this case we have conflicting facts and competing inferences. If there is any room for rational choice between conflicting facts or competing inferences, that task is for the jury. Distilling the essential truth from a raw mixture of circumstances is the fact-finder's function and, under our

system of jurisprudence, the jury is the instrument provided for this purpose.

The mere fact that an injury or death may have been caused in one or two or more ways does not preclude a recovery if the facts and circumstances in evidence warrant a reasonable inference.

We earnestly urge the allowance of the writ in this case.

Respectfully submitted,

JUSTIN WAITKUS,
ANTHONY J. CEFALI,
Attorneys for Petitioner.